Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

RECENT DECISIONS.

ADMINISTRATIVE LAW—MANDAMUS. The relator petitioned as a tax payer to compel the State comptroller to bring suit for a statutory tax on railway passenger receipts. The statute enacted "that the comptroller should collect the tax under such regulations as he should prescribe. *Held*, the duty of the comptroller was discretionary and the relator did not have sufficient interest to maintain the petition. *Leawright* v. *Love* (Texas, 1902) 65 S. W. 1089.

Mandamus will not lie where it would deprive the defendant of his discretion in performing a duty. *People* v. *Commissioners* (1896) 149 N. Y. 30; High, Extraordinary Remedies, § 42. In the principal case the discretion was more apparent than real because the tax could probably have been collected only by suit. *Mandamus* would lie to compel the comptroller to exercise his discretion and to collect the tax in some manner. *People* v. *Supervisors* (1873) 51 N. Y. 401; High, Extraordinary Remedies, § 24. Where the object of the *mandamus* is the enforcement of a public right, the general rule is that the relator need not show that he has a legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the right in question enforced. *Union Pac. Ry.* v. *Hall* (1876) 91 U. S. 355; *Elliot* v. *City of Detroit* (1899) 121 Mich. 611; *Baird* v. *Supervisors* (1893) 138 N. Y. 115. The view of the court in the principal case obtains in a few jurisdictions. *Weeks* v. *Smith* (1889) 81 Me. 538; *Adkins* v. *Doolen* (1880) 23 Kans. 659 *Heffner* v. *Commonwealth* (1857) 28 Pa. St. 108.

AGENCY—USURIOUS CONTRACT. The plaintiff borrowed money from the defendant through the latter's agent, who exacted a commission from the borrower without his principal's knowledge or consent. A note and mortgage were given at the legal rate of interest as security. The plaintiff sought to restrain the foreclosure of the mortgage on the ground that the contract was usurious. *Held*, the injunction should be granted. *Robinson* v. *Sims* (Minn. 1902) 88 N. W. 845.

The presumption is that an agent is not authorized to do an act contrary to law. Therefore, to attach to the principal the responsibility and penalty attendant upon usury, it should be shown that the agent acted with authority. *Stillman* v. *Northrup* (1888) 109 N. Y. 473. Accordingly, the law is well settled that a bonus given to the agent of the lender by the borrower without the lender's knowledge or consent does not render the contract usurious, if the principal is not benefited. *McLean* v. *Camak* (1895) 97 Ga. 804. The principal case is opposed to previous decisions of the same court. *Acheson* v. *Chase* (1881) 28 Minn. 211.

BANKRUPTCY—PREFERENCE—ATTACHMENT. An attachment in New York was *held* not to constitute a preference; so that the attaching creditor could file a petition against his debtor without first surrendering the lien of his attachment. *In re Schenkein & Coney* (1902) 7 Am. B. R. 162. See NOTES, p. 249.

BANKRUPTCY—PREFERENCE—SET-OFF. A creditor who had received payments during the four months prior to the adjudication, but with no intention to obtain a preference, and who had, on the strength of such payments, given to the debtor further credit was *held* to have a provable claim for this credit, without first returning the payments. *In re Dickson* (1902) 7 Am. B. R. 186.

If each payment were for a distinct sale, each transaction might be regarded as closed. *Carson, Pirie, Scott* v. *Trust Co.* (1901) 182 U. S.

438, would not cover such a case. But considering the whole number of sales as one account, the creditor would, under sec. 60, c., be entitled only to set off the amount of the last credit from the amount which under sec. 57 g. he would have to refund in order to prove his claim. See 1 COLUMBIA LAW REVIEW, 261.

BANKRUPTCY—MISTAKE OF LAW. A creditor, believing that his claim had been legally satisfied under a garnishment, relinquished a security consisting in a valid priority as to the proceeds of his debtor's seat in the New York Stock Exchange. On the setting aside of this garnishment by the trustee, it was *held* that the creditor should be restored to his security, even though his mistake was one of law. *In re Swift* (1901) 7 Am. B. R. 117.

The distinction between mistakes of law and those of fact, established by *Bilbie* v. *Lumley* (1802) 2 East. 469, is not strictly adhered to in equity cases. When the party who would profit by the mistake is an officer of the court, such as a trustee, equity will not consider a mistake of law a bar to recovery, *Ex parte Simmonds*, L. R. 16 Q. B. D. 308, and in this respect the equity character of a bankruptcy court is manifest. *Ex parte James* (1874) 9 Ch. App. 609; *Moulton* v. *Bennett* (1836) 18 Wend. 586; *Oil Co.* v. *Hawkins*, 20 C. C. A. 468.

CONFLICT OF LAWS—NEGOTIABLE INSTRUMENTS. The defendant was a joint maker, but, in fact, as surety for her husband, of an accommodation note executed by the members of her husband's firm in Alabama and payable to one of the makers at the plaintiff bank in Illinois. The defendant did not know what use would be made of the note, except that it was to be used to raise money for the firm. The other makers knew that it would be negotiated in Illinois. In Alabama a married woman cannot become surety for her husband, but no such disqualification exists in Illinois. *Held*, it was an Alabama transaction, and the validity of the contract was governed by the *lex loci contractus*, the defendant not having a clear intention that her obligation should be controlled by the *lex loci solutionis*. *Union Nat. Bank of Chicago* v. *Chapman* (1902) 169 N. Y. 538. See NOTES, p. 253.

CONSTITUTIONAL LAW - EQUAL PROTECTION OF THE LAWS—CLASSIFICATION FOR TAXATION. Acts of West Virginia, c. 35, §§ 86 and 87, classified domestic corporations according to the location of their principal place of business. A greater license tax was imposed upon those having this place of business without the State than upon others. *Held*, the act was not unconstitutional. *Blue Jacket Copper Co.* v. *Scherr* (W. Va. 1901) 40 S. E. 514.

Classification for purposes of taxation must, in order to escape the prohibiton of the "equality" clause of the fourteenth amendment, be based on sworn reasonable ground of distinction; it cannot be merely an arbitrary division. *Magoun* v. *Bank* (1898) 170 U. S. 283. The decision in the principal case is based on the ground that one class of corporations paid to the incorporating State taxes on practically all of their property, while the other class paid little or nothing. The validity of such a distinction was recognized in *State* v. *Willingham* (Wyoming, 1900) 52 L. R. A. 198. This case, although not precisely in point, is extremely pertinent. The principal case is perhaps less interesting from a legal, than from an economic point of view.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—MEDICAL PRACTICE—OSTEOPATHY. A statute, sections 4403f, Rev. St. Ohio, as amended by act of April 14, 1900, required those who had practised or were about to practice medicine to prove reasonable qualifications, and another provision required osteopaths to hold diplomas from colleges demanding at least four years of study, and refused them permission to prescribe drugs or to perform surgical operations. The same statute permitted practice by regular physcians, holding diplomas from any medical school

in good standing, regardless of the length of its course. *Held*, the first provision was valid, as a reasonable police regulation, but the provision in regard to osteopaths was void, in so far as it required of them longer preparation than of other physicians, because it denied to them the equal protection of the laws. *State* v. *Gravett* (Ohio, 1901) 62 N. E. 325. See NOTES, p. 251.

CONTRACTS—EXTENSION OF MORTGAGE DEBT—USURY. One Morris mortgaged certain premises to the plaintiff. Subsequently Morris conveyed the same land to the defendant who took it without assuming personal liability on the mortgage. At maturity, the plaintiff agreed to extend the time of payment for one year on the defendant's personally assuming the mortages and paying him the legal rate of interest and eight hundred dollars in addition. *Held*, this agreement was usurious and void. *Gantz* v. *Lancaster* (N. Y. 1902) 62 N. E. 413.

To constitute usury there must be either a loan, or the forbearance of a debt or sum of money due. *Hogg* v. *Ruffner* (1861) 1 Black, 115. At the time of making the agreement in the principal case no debt was due from the defendant, nor did the agreement have any of the elements of a loan. The statutes of usury were made for the protection of borrowers and should not be applied to agreements affecting only the debts of third parties. This was the view of the lower court. (1900) 63 N. Y. Supp. 800. In reversing this decision the Court of Appeals attached great importance to the fact that the defendant as part of the contract assumed personal liability for the debt. But it was not his debt until after the contract was executed; and the transaction was nothing more than an agreement to forbear enforcing the debt of another. See in this connection *Struthers* v. *Drexel* (1887) 122 U. S. 487.

CONTRACTS—ILLEGALITY—FICTITIOUS SUITS. The defendant contracted to sell its bonds to the plaintiff, conditioned on the plaintiff's bringing a feigned suit to determine their validity. The suit was brought successfully. In an action on the contract, it was *held* that the condition was void as against public policy, and there could be no recovery. *Van Horn* v. *Kittitas County* (1901) 112 Fed. 1.

The broad proposition upon which this decision rests is that such agreements are against public policy. *Lord* v. *Veazie* (1850) 8 How. 251; *Brown* v. *Bank* (1893) 137 Ind. 655. So the courts refuse to entertain suits where there is no real controversy because it is a misuse of their machinery. *California* v. *San P. R. Co.* (1892) 149 U. S. 308. Agreements not to set up legal defenses are also void. *Pope Mf'g. Co.* v. *Gormully* (1891) 144 U. S. 224, 238. The same result as that in the principal case was reached in *Connolly* v. *Cunningham* (1886) 2 Wash. Ty. 242.

CORPORATIONS—AMENDMENT OF BY-LAWS—EFFECT ON RIGHTS OF MEMBERS. The New York Produce Exchange, under authority conferred by its amended charter, enacted by-laws creating by assessment, upon certain conditions, a gratuity fund for the benefit of the widows and familiesof its deceased subscribing members. The contracts of insurance were made subject to the by-laws and charter of the corporation. Subsequently, a by-law was passed directing the trustees of the fund to distribute it among the living subscribers. *Held*, the amended by-law was void, because the Exchange had no authority under its charter to create a fund for distribution among its living members, and because this was an unreasonable alteration of the contract between each contributor and the Exchange. *Parish et al.* v. *N. Y. Produce Exchange et al.* (1901) 169 N. Y. 34.

In *Smith* v. *Galloway* [1898] 1 Q. B. 71, it was said that a corporation may so amend its by-laws as to affect vested rights of a promisee within the power of alteration no matter what its extent might be. And in a late Massachusetts case an amendment reducing sick benefits adopted after a member had become entitled to receive them was upheld. *Pain* v. *Soc. St. Jean Baptiste* (1899) 172 Mass. 319. This view obtains in

several other jurisdictions. In New York the decisions of the lower courts have not been harmonious, but the tendency seems to have been in favor of the doctrine invoked in the principal case, which is both just and sound. *Weiler* v. *Aid Union* (1895) 92 Hun 277; *Trust Co.* v. *Aberle* (1897) 19 App. Div. 79; *Feierstein* v. *Supreme Lodge* (1902) 68 App. Div. The conclusion follows from the reasoning in the leading case of *Kent* v. *Quicksilver Mining Co.* (1879) 78 N. Y. 159. The same principle was applied in *Hale* v. *Equitable Aid Union* (1895) 168 Pa. 377, and in *Supreme Council* v. *Getz* (C. C. A. 1901) 112 Fed. 119.

CRIMINAL LAW—FALSE PRETENCES. Where an attempt was made to induce one by false pretences to make an unlawful payment of money, it was *held* that the crime of attempting to obtain money under false pretences had been committed. *People* v. *Howard* (Cal. 1901) 67 Pac. 148.

This decision repudiates the doctrine of New York that in a prosecution for obtaining goods under false pretences it is a defence that the one defrauded is also in the wrong. This doctrine rests on the ground that it is the purpose of the law to protect only those who, for an honest purpose, have parted with their goods. *McCord* v. *People* (1871) 46 N. Y. 470. As applied to civil actions that doctrine seems sound, but it would seem to have no place in criminal law, where the object is to punish wrongs done the state and the fault of one party should not be received in excuse for the crime of another. A majority of jurisdictions agree with the principal case. *Gillmore* v. *People* (1900) 87 Ill. App. 128; *People* v. *Watson* (1889) 75 Mich. 582. In New York, a legislative act has been recommended to change the existing doctrine. *People* v. *Livingston* (1900) 47 App. Div. 283.

CRIMINAL LAW—INDICTMENT FOR OBSTRUCTION OF JUSTICE. A newspaper published statements concerning the conduct and character of persons then under trial on a criminal charge, which would have been inadmissible in evidence against them. The editor and the reporter who wrote the articles were convicted on an indictment charging them with unlawfully attempting to pervert the course of justice by publishing the articles in question. *The King* v. *Tibbits and Windust* [1902] 1 K. B. 77. See NOTES, p. 246.

CRIMINAL LAW—PROCEDURE—INCOMPLETE VERDICT. On an indictment in two counts for two distinct crimes, the jury found the prisoner guilty on the first, the verdict being silent as to the second. *Held*, the verdict was valid, and equivalent to an express finding of not guilty on the second count. *Hechter* v. *State* (Md. 1902) 50 Atl. 1041.

The old common law regarded the indictment as entire and the verdict a nullity unless it found on every point in issue. *King* v. *Hayes* (1728) 2 Ld. Raym. 1519. Counts are now treated in effect as separate indictments. *Latham* v. *Regina* (1864) 5 B. & S. 635; *Selvester* v. *U. S.* (1897) 170 U. S. 262. A failure to find on one is generally held to be an acquittal, by implication, upon that charge. *Girt* v. *Com.* (1853) 22 Pa. St. 351; *State* v. *Hull* (1872) 30 Wis. 419; *Thomas* v. *People* (1885) 113 Ill. 531; *George* v. *State* (1899) 59 Neb. 163. But where the counts charge separate and distinct crimes, some authorities limit the rule and require a finding on each. *Wilson* v. *State* (1851) 20 Ohio, 26; *Com.* v. *Carey* (1869) 103 Mass. 213. The principal case seems to represent the prevailing doctrine, and illustrates the more liberal and rational views of the modern courts in matters of procedure. The decision overrules *State* v. *Sutton* (1846) 4 Gill, 494, which up to this time has been the law in Maryland.

DOMESTIC RELATIONS—DIVORCE—ALIMONY—WIFE AS CREDITOR OF HUSBAND. In an action for divorce and alimony and also to set aside a conveyance previously made by the defendant to his daughter, it was *held* that the wife was a present and continuing creditor of her husband, and a judgment for alimony was not a necessary prerequisite for her to attack

such conveyance as fraudulent and, as against her, void. *De Ruiter* v. *De Ruiter* (Ind. 1901) 62 N. E. 100.

The courts of several States have reached the same result. *Feigley* v. *Feigley* (1855) 7 Md. 537. This seems to be the view in several other jurisdictions where a wife may maintain a bill in equity for alimony, and, if need be, also to avoid a fraudulent conveyance, without a prayer for divorce, or an averment of a previous divorce. *Hinds* v. *Hinds* (1885) 80 Ala. 244; *Hanscom* v. *Hanscom* (Colo. 1895) 39 Pac. 885. Certainly, after judgment of divorce and alimony, she is on the same footing as other creditors, and may maintain a creditor's bill, upon a proper showing. *Tyler* v. *Tyler* (1888) 126 Ill. 525; *Green* v. *Adams* (1887) 59 Vt. 602; *Chase* v. *Chase* (1870) 105 Mass. 385. But these cases are based on the principle that she is a *subsequent* creditor within the statute of fraudulent conveyances. And, consequently, in such jurisdictions a suit for alimony does not lie unless consequent upon or annexed to an application for divorce. *Duncan* v. *Duncan* (1815) 19 Ves. 384; *Ramsden* v. *Ramsden* (1883) 91 N. Y. 281.

DOMESTIC RELATIONS—HUSBAND AS WIFE'S AGENT. While the appellant's husband was indebted to the appellee, a relative of the husband loaned money nominally to the appellant, which the husband invested in business conducted entirely by himself, but in the appellant's name. A house and lot acquired with the profits of the business were held in the same manner. *Held*, this property might be subjected to the payment of a judgment recovered by the appellee against the husband. *Blackburn* v. *Thompson* (Ky. 1902) 66 S. W. 5.

The general rule is that a creditor has no interest in his debtor's labor, and the debtor may either refuse to labor or give his labor away. And in the absence of fraud the creditor has no interest in the product of such labor unless it is the debtor's property. *Cooper* v. *Ham* (1875) 49 Ind. 393; *Buckley* v. *Wells* (1865) 33 N. Y. 518. In some jurisdictions it is held that when the husband expends his skill and labor upon the wife's property, the increase in the value of the property, beyond a reasonable return on the investment, is subject to the husband's debts. *Wilson* v. *Loomis* (1870) 55 Ill. 352; *Glidden* v. *Taylor* (1866) 16 Ohio St. 509. Where the capital belongs to the husband and is fraudulently put in the wife's name, the whole is subject to the husband's debt and this seems to be the fact in the principal case.

EQUITY—RIGHT TO EXCLUSIVE USE OF NAME. The plaintiff, a charitable corporation, sought to enjoin the defendant, a corporation organized for like purposes, from using its name, on the ground that the similarity of the names was a fraud on the plaintiff and the public. *Held* (two dissenting), the injunction should be granted, on the principle involved in the "trade-name" cases. *International Committee Y. W. C. A.* v. *Young Woman's C. A. of C.* (Ill. 1901) 62 N. E. 551. See NOTES, p. 245.

EQUITY—MISTAKE. The plaintiff, injured on a railroad, being visited by the company's claim agent together with its local physician, who was also the woman's personal physician, released her claim against the company for $500, which represented the work she expected to lose, the agent and the physician telling her, in good faith, that she would be incapacitated for about a year. At the end of a year her injuries proved permanent, and she filed a bill to have the release cancelled. *Held*, her prayer should be granted, as the release had been signed under a mistake of fact, which had been induced, though innocently, by the misrepresentations of the company's agents. *Wilcox* v. *Chicago & N. W. Ry. Co.* (1901) 111 Fed. 435.

The courts do not hesitate to set aside releases of this kind if the physican acted fraudulently, *Missouri Pac. Ry. Co.* v. *Goodholm* (1900) 61 Kan. 758, or if the signer, without negligence, was mistaken as to the contents of the release. *Great Northern Ry. Co.* v. *Kasischke* (1900) 104 Fed. 440. The principal case, however, is questionable. There is no rea-

son why the plaintiff should have relied absolutely upon the representation, as it was necessarily of a speculative nature, and, though the expression of a professional man, it was still merely an opinion. Another objection is, that the physician was the plaintiff's representative as well as the defendant's, and it has been held that where the company is not responsible for the mistake, the release will be sustained. *Seeley* v. *Citizens Traction Co.* (1897) 179 Pa. St. 334; *Houston etc. R. Co.* v. *McCarty* (Tex. 1901) 60 S. W. 429.

INSURANCE—CONSTRUCTION OF INDEMNITY POLICY. The plaintiff was insured against "loss from liability to any person who might * * * accidentally sustain bodily injuries while travelling on the railway of the insured * * * under circumstances which would impose upon the insured a common law or statutory liability for such injuries." *Held* (MORTON and BARKER, J.J., dissenting), the policy did not cover a loss sustained by reason of a person being instantly killed without conscious suffering. *Worcester etc. St. Ry. Co.* v. *Travellers' Ins. Co.* (Mass. 1902) 62 N. E. 364.

The insured sustained no loss under the statute providing for the survival of actions for personal injuries, because the Massachusetts courts have held that the statute does not cover a case of instantaneous death. *Kearney* v. *Ry.* (1851) 9 Cush. 108. The loss accrued under a statute vesting a right of action in the personal representative for the use of the widow and next of kin. It was agreed that this liability was not to the executor or administrator as representing the deceased, but, in reality, a new cause of action for the beneficiaries arising at the death of the injured party. See *Wooden* v. *Ry. Co.* (1891) 126 N. Y. 10. The court divided, however, upon the question whether the parties contemplated a liability only to the person injured. The case is an interesting departure from the general practice of construing the policy most strongly against the insurer.

INSURANCE—REINSTATEMENT CLAUSE IN FIRE POLICY. A statute required that, in case of total loss, the full amount of the sum in which the premises were insured should be paid. *Held*, a clause in a policy permitting the insurer to rebuild at its option, in case of total loss, was void, because the insurer would not elect to rebuild unless it could do so at an outlay less than the amount of the policy. *Milwaukee Mech. Ins. Co.* v. *Russell* (Ohio, 1901) 62 N.E. 338.

Under a similar statute in Texas, the same result has been reached. *Phœnix Ins. Co.* v. *Levy* (1895) 12 Tex. Civ. App. 45. In Wisconsin, on the other hand, it was held that the reinstatement clause in the statutory "standard fire policy," and a clause like that involved in the principal case were not inconsistent. *Temple* v. *Niagara F. Ins. Co.* (1901) 109 Wis. 372. It is settled that, on the insurer's election to exercise the option of reinstatement, he is bound to erect a building of equal value with the one destroyed, though the outlay therefor may exceed the face value of the policy. *Morrell* v. *Fire Ins. Co.* (1865) 33 N. Y. 429. But, on the other hand, the measure of damages is only the value of such a building and not the face value of the policy. *Hartford Fire Ins. Co.* v. *Hotel Co.* (C. C. A. 1897) 82 Fed. 546. The decision in the principal case would, therefore, seem to be correct.

INSURANCE—WAIVER OF CONDITION BY AGENT—EVIDENCE. A policy of insurance, containing a provision against other insurance, was issued to an applicant, who had, to the knowledge of the insurer's agent, a prior policy on the same property. *Held*, parol evidence of the knowledge of the agent was inadmissible, because it tended to vary the written contract. *Northern Assurance Co.* v. *Grand View Building Association* (1902) 22 Sup. Ct. 133. See NOTES, p. 243.

INSURANCE—WARRANTY—DOMESTIC RELATIONS—INFANCY. An infant, in an application for a life insurance policy, made false answers to questions which, by the terms of the policy, were made warranties. In an action by

the beneficiary, it was *held* that this was no defense, because an infant is not bound by his warranties. *O'Rourke* v. *Hancock Ins. Co.* (R. I. 1902) 50 Atl. 834.

This was a case of first impression and the decision was based upon those cases in which the plea of infancy was allowed in a suit for false representations, where the basis of the transaction was an ordinary contract. *Doran* v. *Smith* (1877) 49 Vt. 353; *Prescott* v. *Norris* (1885) 32 N. H..101. The analogy of those cases to the principal case is not entirely clear, for a so-called warranty in an insurance policy is a condition that the policy shall be void, if it is not strictly fulfilled. *Campbell* v. *Ins. Co.* (1867) 98 Mass. 381; *Thompson* v. *Weems* (1884) L. R. 9 App. Cas. 671; May on Insurance, 2d ed. § 156. It would seem, therefore, that the defendant should have been allowed to set up the breach of this condition, upon the fulfillment of which the contract depended, regardless of the question of infancy.

MORTGAGES—EXECUTION SALE—REDEMPTION—STATUTE OF FRAUDS. The plaintiff mortgaged land, which was sold under a judgment of foreclosure. A statute provided that the land might be redeemed by the mortgagor within a year, and the defendant made a parol agreement to extend the time of redemption. *Held*, the agreement was not within the statute of frauds. *Turpie* v. *Lowe* (Ind. 1892) 62 N. E. 484.

It has been held that an agreement to extend the time of redemption is not a contract for the sale of land or an interest in land, but merely the extension of the time in which a right already existing may be exercised. *Griffin* v. *Coffey* (Ky. 1849) 9 B. Mon. 452. But the right to redeem from such sales is statutory, and payment by the redemptioner to the clerk of the court in which the sale is recorded vacates the sale, and is therefore a condition subsequent in the conveyance by the sheriff to the purchaser. *Indiana Code Civ. Proc.* §§ 768–770. As title can be divested only by the operation of a condition, by operation of law, or by the act of the person in whom the title is, and, as conditions are made only by the grantor, it follows that the agreement made by the grantee of the sheriff could not affect the title, but to be effective at all must take effect as a contract to recovery, and as such would come within the statute of frauds. *Dollar Savings Bank* v. *Bennett* (1874) 76 Pa. St. 402; *McKee* v. *Vail* (1878) 79 N. C. 194.

MORTGAGES—LIMITATION OF ACTIONS—SUSPENSION OF THE STATUTE. In an action to foreclose a mortgage, it was *held* that the absence of a mortgagor from the State would not prevent the statute of limitations from running in favor of his grantee, who had not assumed the debt. *George* v. *Butler* (Wash. 1901) 67 Pac. 263.

There are conflicting decisions on this point in those jurisdictions, where, as in Washington, the rule obtains that the barring of an action on the mortgage debt by the statute of limitations bars the action on the mortgage itself. The principal case follows the rule laid down in *Wood* v. *Goodfellow* (1872) 43 Cal. 185. *Waterson* v. *Kirkwood* (1876) 17 Kan. 9, and *Clinton County* v. *Cox* (1873) 37 Ia. 570, are *contra*. The California case proceeds upon the principle that a mortgagor cannot increase the burdens on the mortgaged premises as against his grantees; Iowa and Kansas adopt the view that the grantee of the mortgagor cannot acquire any rights superior to those of his grantor. This latter view appears more consistent with the general rule as to limitation of the action of foreclosure that is upheld in all these jurisdictions, for if the mortgage is such a security for the debt that the right of action on the former is barred by the barring of action on the latter, the converse should be true that any cause which will keep alive the debt should have the same effect on the mortgage. And this conclusion involves less departure from the equity rule, that a grantee of the equity of redemption cannot avail himself of the presumption of payment after twenty years' possession, if the mortgagor has made payments in the meantime. *Hughes* v. *Edwards* (1829) 9 Wheat. 489. See also *Fowler* v. *Wood* (1894) 78 Hun, 304 and *Ewell* v. *Daggs* (1882) 108 U. S. 143.

MUNICIPAL CORPORATIONS—DEFECTIVE INCORPORATION—ESTOPPEL. A State had dealt for several years with a school district as if it had been regularly organized, and, in reliance upon this, the district had issued bonds and made valuable public improvements with the full knowledge and acquiescence of the State. *Held*, its corporate existence could not be questioned by *quo warranto* proceedings. *State* v. *School District No. 108 Dakota Co.* (Minn. 1902) 88 N. W. 751.

Where a municipal corporation has existed *de facto* and been dealt with as such for a length of time, the State cannot question the validity of its organization. *Atty. Gen.* v. *Maynard* (1867) 15 Mich. 463; *People* v. *Alturas Co.* (Idaho, 1899) 55 Pac. 1067. These decisions are based on principles of estoppel, and in *State* v. *Des Moines* (Iowa, 1896) 65 N. W. 818, this doctrine was applied where the statute under which a county had been organized was confessedly void. But these cases are not to be regarded as abrogating the general rule that the State is not estopped by the unauthorized acts of its agents. *Atty.-Gen.* v. *Marr* (1885) 55 Mich. 445. Cases involving private or even quasi-public corporations would be distinguished from the present case. *Toll Road Co.* v. *State* (1896) 22 Colo. 429.

MUNICIPAL CORPORATIONS—LIABILITY FOR SALARIES. A city in good faith paid a tax collector's salary to the *de facto* collector. *Held*, it was not liable therefor to the *de jure* collector on his recovering possession of the office. *Coughlin* v. *McElroy* (Conn. 1902) 50 Atl. 1025.

The rule here stated is the prevailing one in this country. *Board* v. *Benoit* (1870) 20 Mich. 76; *McVeany* v. *Mayor* (1880) 80 N. Y. 185. These decisions are dictated by the rule of public policy that, on account of the exigencies of public business, all persons dealing with a *de facto* officer should be protected. Although the city is protected, the right of the officer *de jure* to his salary as an incident of the office is not denied. *McVeany* v. *Mayor*, *supra*. Some States have refused to recognize this rule of public policy and put the plaintiff to a possibly barren recovery against the *de facto* officer. *Ward* v. *Marshall* (1892) 96 Cal. 155; *State* v. *Carr* (1891) 129 Ind. 44; *Andrews* v. *Portland* (1887) 79 Me. 484; *Philadelphia* v. *Rink* (Pa. 1886) 2 Atl. 505.

PARTNERSHIP—DISSOLUTION—LIABILITY FOR TORT. The defendants, as partners, employed the plaintiff, but without his knowledge they became incorporated, their relative interests being the same as before. The plaintiff, still ignorant of this change, continued to work in accordance with the terms of his contract and was injured through the negligence of a vice-principal. *Held*, these facts did not prove a dissolution of the partnership and, therefore, the defendants were liable. *Goodwin* v. *Smith* (Ky. 1902) 66 S. W. 179.

The only argument urged in support of the proposition that the partnership was not dissolved was that no information of this change was actually given to the plaintiff. Had this been an action in contract, or in tort for a loss caused by the defendants continuing to hold themselves out as partners, *Sherrod* v. *Langdon* (1866) 21 Ia. 518, this fact might have been a material one, by way of estoppel. But that principle could not be applied in the present case, for in no legal sense was their failure to inform him of their dissolution, the cause of his injury. It is now generally held that an ostensible partner is not answerable in tort to third persons, who have been injured by the negligence of an agent of the firm. *Smith* v. *Bailey* (1891) 2 Q. B. 403. It would seem that this doctrine is applicable to the present case.

PARTNERSHIP—INSOLVENCY—SPECIAL PARTNER AS CREDITOR. The petitioner was a special partner in a firm of stock brokers which had made a general assignment for the benefit of creditors, and was also a customer of the firm, keeping with it a speculative account. On the day of the failure he was on its books as "long" of several thousand shares of stock and owed the firm over a hundred thousand dollars. On learning of the failure, he tendered the amount due and demanded the stocks held as collat-

eral, but the assignee was unable to surrender the securities inasmuch as these had been repledged by the firm with various bankers prior to the assignment. Thereupon the petitioner obtained possession of his stocks by paying to the bankers the market value of the shares, which exceeded the amount due from him to the firm by sixty thousand dollars. The loans to the firm by the aforesaid bankers were paid by the sale of collateral and a large surplus remained in the hands of the assignee. The referee held that the petitioner, being a special partner, was not entitled to payment of his claim until the debts of all other creditors were first satisfied. *Held*, the ruling was erroneous, the petitioner being entitled to come in with the other claimants. *Matter of Price, McCormick & Co.; In re claim of Crocker* (1902) 68 App. Div. —. See NOTES, p. 247.

PARTNERSHIP—RELEASE OF PARTNER BY JUDGMENT CREDITOR. A judgment creditor of a firm and its individual members, after the dissolution of the firm, released one partner according to § 1942 of the New York Code of Civil Procedure, and later assigned the judgment, subject to this release, to K., who applied for a receivership of the partnership property. *Held*, K, "acquired by his assignment a judgment against only two of the co-partners" and was, therefore, not entitled to the relief sought. *Hunter* v. *Hunter* (1902) 73 N. Y. Supp. 886.

The point involved in this case does not seem to have been adjudicated before. The interpretation by the court of the law in question seems sound; for the statute provides that in case of the dissolution of a firm, by consent or otherwise, a release of one member exonerates him "from all liability incurred by reason of his connection with the partnership." As the statute is silent upon a release before dissolution we may infer that at present in New York the law is as follows: if the release is given before dissolution the common law still obtains, *i. e.* the release of one member discharges the others, *Pierson* v. *Hooker* (1808) 3 Johns. 68; but if the release is given after dissolution the common law is so far changed as to allow the creditor to proceed against the others, although not against the property of the firm.

PARTNERSHIP—SALE OF GOOD WILL—RIGHT TO SOLICIT OLD CUSTOMERS. Articles of copartnership provided for a sale of the property, on dissolution, by the defendant to the plaintiff, at the value of the property as shown by the books. The good will was mentioned neither in the articles nor in the contract of sale, but only in the provision as to the death of one partner. *Held*, the plaintiff was not entitled, in equity, to an accounting for damages against the defendant, who was soliciting trade from the customers of the old firm. *Webster* v. *Webster* (Mass. 1902) 62 N. E. 383.

A purchaser of all the partnership property becomes the owner of the good will. *Hoxie* v. *Chaney* (1886) 143 Mass. 592; *Jennings* v. *Jennings* [1898] 1 Ch. 378. The question is usually raised by a prayer for an injunction to restrain the retiring partner from soliciting trade from the customers of the old firm. Such injunctions seem to have been granted in England until 1884, when it was decided by a divided court, in *Pearson* v. *Pearson*, 27 Ch. D. 145, that the retiring partner might set up a rival business and might solicit the customers of the old firm. The latter point in this decision was overruled in *Trego* v. *Hunt* [1896] A. C. 7. In the United States, *Pearson* v. *Pearson*, *supra*, has been generally followed. *Cotrell* v. *Babcock Printing Press Co.* (1886) 54 Conn. 122; *Ward & Co. Ltd.* v. *Ward* (1891) 15 N. Y. Supp. 913; *Williams* v. *Farrand* (1891) 88 Mich. 473. These cases hold that in the absence of an express agreement to the contrary, a rival business may be set up and trade solicited, so long as the former partner does not represent himself as the successor of the old firm. In Massachusetts, however, a different rule seems to have prevailed, based largely on the nature of the business. Thus a former partner may set up a grocery business, *Bassett* v. *Percival* (1862) 5 Allen, 345; but may not engage in the business of a common carrier over the same route in competition with the old firm, since here the good will is connected with the place of business. *Angier* v. *Webber* (1867) 14 Allen, 211. But in *Hol-*

brook v. *Nesbitt* (1895) 163 Mass. 120, the court went out of its way to approve of *Pearson* v. *Pearson*, *supra*, by way of *dictum*. In the brief report of the principal case the nature of the business is not given, but it was clear that the good will was not connected with the place of business. For a thorough study of this question, see Burdick on Partnership, 350–359.

REAL PROPERTY—EASEMENTS. The question arose under the English Conveyancing Act of 1886, whether a grant of land bordering on an artificial pond, in which cattle had been in the habit of watering, included an easement of watering cattle, when the grantee had no right to insist on the maintenance of the pond. This was treated as equivalent to the question whether such an easement could arise by prescription. *Held*, the easement claimed was not included. *Burrows* v. *Lang* [1901] 2 Ch. 502.

The subject is practically new. FARWELL, J., argued that such a privilege could not be enjoyed as of right, as an easement must be, because its enjoyment necessarily depended on the will of the servient owner, who could at any time dry up the pond. Destroying the property in which an easement is enjoyed, however, is different from interfering with the easement itself. A grant can be conceived of to take water as long as the grantor shall maintain a pond, and if such a right can be granted it can be acquired by prescription. A property right need not be perpetual, *e. g.*, a party wall easement. In the only other case found upon the question, the Pennsylvania court reached an opposite result. *Kearney* v. *Borough of West Chester* (1901) 199 Pa. St. 392; 1 COLUMBIA LAW REVIEW, 560.

REAL PROPERTY—RE-ENTRY—SUMMARY PROCEEDINGS. The defendant for breach of condition had terminated the lease with the plaintiff by regaining possession of the demised premises by summary proceedings, and the plaintiff sued to recover a deposit made to indemnify the lessor for the last two months' rent. *Held*, the plaintiff could recover this deposit, less the rent due at the termination of the lease, and re-entry could be maintained only by ejectment. *Michaels* v. *Fishel* (1902) 169 N. Y. 381. See NOTES, p. 250.

REAL PROPERTY—RESERVATIONS—EXCEPTIONS. The grantors, in their deed, reserved all existing timber and the right to remove it within five years. In an action by the grantees against third parties for cutting the timber, it was *held* that there could be recovery, for the description of the timber amounted to an "exception" and not a "reservation." *Cohen* v. *Bryant* (Ky. 1901) 65 S. W. 347.

"A reservation is a clause in a deed, whereby the grantor reserves some new thing to himself, issuing out of the thing granted, and not *in esse* before; but an exception is always a part of the thing granted, or out of the general words and description in the grant." 4 Kent Com. 468; Coke, 1 Inst. 47a; 3 Devlin on Deeds, § 979. The title to the timber was, therefore, in the grantors. Even assuming that the third parties, the defendants in this action, had no title to the timber, they were, at least, in no poorer position than the grantees of the land. The distinction is important, because, had there been a reservation and not an exception, the title to the trees would have passed to the grantees, until the grantors exercised their right. Grantees can, therefore, in the case of reservations, maintain actions against trespassers on the thing reserved. *Provost* v. *Calder* (1829) 2 Wend. 517; *Matthews* v. *Matthews* (1854) 3 Am. Law Reg. (O. S.) 117. See also *Western Union Telegraph Co.* v. *Shepard* (N. Y. 1901) 62 N. E. 154.

REAL PROPERTY—RIPARIAN RIGHTS—COMPENSATION. The defendant, authorized by the United States and the State, placed dredgings behind a bulkhead, while improving the navigation of the Hudson River under a contract with the United States. Some of the dredgings escaped and diminished the depth of water over the land of the plaintiff, which adjoined the bulkhead. *Held*, the plaintiff could not recover from the

contractor for the impairment of his rights of fishing and taking ice, and a verdict for nominal damages for loss of access, where no special damage was shown, except in connection with fishing or taking ice, was correct. *Slingerland* v. *International Contracting Co.* (N. Y. 1901) 61 N. E. 995.

Whatever may be thought of the reasoning in the decision, both propositions seem to be well supported by authority in New York. A discussion of the rights of riparian owners as affected by improvement of navigation, will be found in 1 COLUMBIA LAW REVIEW, 121 and 551.

REAL PROPERTY—SPECIAL POWER—APPOINTMENT—ADEMPTION. B., under the will of M., was equitable life tenant of certain lands with power both of appointment by will amongst his children and of leasing. In default of appointment the property was to go to all his children in certain shares. In exercise of his power B. by will appointed all the property to his two sons. Subsequently, he granted long leases of parts of the real estate at large premiums, which were paid to the trustees under M.'s will and invested by them. B. died without having altered his will. *Held*, these premiums went as in default of appointment. *In re Moses* [1902] 1 Ch 100. (C. A.).

When a testamentary appointment under a power may be said to be adeemed, by a change in the character of the subject matter of the appointment between the date of the will exercising the power of appointment and the death of the appointor, is a question which has given rise to considerable discussion. This case is of importance because it settles the law, in England that there is no distinction with regard to ademption between a will exercising a general power and a will exercising a special power. Lord ST. LEONARDS in Sugden on Powers, 8th ed. pp. 308, 309, intimates that a special power, such as that in the principal case, would not be adeemed by the change made by the appointor in the character of this property, but the court expressly disapproved his *dicta*.

REAL PROPERTY—SUB-LETTING—OCCUPATION BY SERVANT. The defendant, who occupied premises under a lease containing a condition of forfeiture for sub-letting, placed care-takers in charge. The lessor refused them access and sued the lessee for rent. *Held*, this amounted to an eviction and it was a question for the jury whether there was a subletting. *Presby* v. *Benjamin* (N. Y. 1902) 62 N. E, 430.

Restrictive covenants are construed very narrowly. *Lynde* v. *Hough* (1857) 27 Barb. 415. Where the occupancy is merely incidental to the employment, no estate is created in the occupant, *Kerrains* v. *People* (1875) 60 N. Y. 221, and allowing such an occupation would not amount to a sub-letting. There is good authority for the holding that it is a question of fact whether any estate is created. *Cunningham* v. *Bank* (1884) 138 Mass. 480; *State* v. *Hayes* (1879) 59 N. H. 450; but it is thought to be the better view to regard it as a mixed question of law and fact. *Bowman* v. *Bradley* (1892) 151 Pa. 351; *Fox* v. *Dalbey* (1874) L. R. 10 C. P. 284.

STATUTES—NEW YORK CIVIL CODE—FOREIGN CORPORATIONS. The plaintiff and the defendant were Illinois corporations. The plaintiff brought an action in New York on a judgment recovered against the defendant in Illinois. *Held*, this action was not maintainable under § 1780 of the New York Code of Civil Procedure, which provides that "an action against a foreign corporation may be maintained by another foreign corporation * * * in one of the following cases only * * * 3. Where the cause of action arose within the State." *Anglo-American Provision Co.* v. *Davis Provision Co.* (N. Y. 1902) 62 N. E. 587.

Two questions are involved in this case. Can a State arbitrarily impose limitations on the right of a foreign corporation to sue in its courts? Does the "full faith and credit" clause of the constitution require a State court to enforce foreign judgments? Since a corporation has no extra-territorial existence, and cannot, of right, enter a foreign

jurisdiction, any conditions which a State may see fit to impose on a foreign corporation doing business within its boundaries are valid. *Paul* v. *Virginia* (1868) 8 Wall. 168. And this would seem to include a limitation upon the right to sue in its courts. The second question was discussed and the authorities collected in the case of *Wisconsin* v. *Pelican Ins. Co.* (1887) 127 U. S. 265, which seems to settle the question that the effect of this provision was merely to establish a rule of evidence without affecting the jurisdiction of State courts. The contention that the cause of action arose within New York, because a judgment is a contract performable anywhere in the United States where the judgment debtor may be found, is open to the objection, that a judgment is not strictly a contract, *Bidleson* v. *Whytle* (1764) 3 Burrows, 1545; *Louisiana* v. *New Orleans* (1883) 109 U. S. 285, and even if it were, it did not arise in New York.

TAXATION—MUNICIPAL CORPORATIONS—ESTOPPEL. The plaintiff loaned money and took a mortgage on certain land as security, relying on the accuracy of the city tax records, which showed that all taxes on the land had been paid. The taxes had not in fact been paid, and the plaintiff sought to restrain all proceedings to collect them. *Held*, the plaintiff was not entitled to relief. *Philadelphia Mortgage and Trust Co.* v. *City of Omaha* (Neb. 1901) 88 N. W. 523.

In Nebraska real estate taxes are a charge on the real estate only, and are not the personal debt or obligation of the land owner. *Grant* v. *Bartholomew* (1899) 61 Neb. 673. The city had no remedy, therefore, against the mortgagor, to whom the property belonged at the time the taxes became due. The court refused to apply the doctrine of estoppel, on the ground that the city could not be estopped by any act done in its governmental capacity. A municipal corporation is not liable for the tortious acts of officials, whose duties are of a public or governmental nature. *Maxmilian* v. *Mayor* (1875) 62 N. Y. 160; *Murphy* v. *Needham* (1900) 176 Mass. 422. This doctrine rests on the argument that in the performance of public duties, officers are the servants of the people, and not of the city, considered as a corporation. If a public officer is not the servant of the city, so as to make it liable for his misrepresentations, it is difficult to see how his acts can estop the city. There is, however, much conflict of authority upon this subject. Dillon, Municipal Corporations, §§ 667 and 675; *St. Louis* v. *Gorman* (1860) 29 Mo. 593; *McFarlane* v. *Kerr* (1863) 10 Bos. 249; *Rossire* v. *Boston* (1863) 4 Allen, 57.

TAXATION—SPECIAL ASSESSMENTS—ESTIMATING BENEFITS. The legislature incorporated a terminal company to build a railway station and in the same act gave power to the street commissioners of the city to widen and extend two streets. They were authorized to assess one half the cost of the latter improvement upon the property owners who were benefited. *Held*, this was a single scheme of public improvement and the board, in estimating the benefits, might properly take into consideration the increase in value of the property due to the location of the station. *Sears* v. *Board of Street Commissioners* (Mass. 1902) 62 N. E. 397. See NOTES, p. 242.

TORTS—NEGLIGENCE—FAILURE TO DELIVER TELEGRAM—WHO MAY SUE. A telegram was sent to one Jumper worded, "Wife very ill. Come at once. Let parents and G. B. Spivey know." The telegram was not delivered for seven days. *Held*, the wife's father being a person for whose benefit the message was sent could recover against the company. *Butler* v. *W. U. Tel. Co.* (S. C. 1901) 40 S. E. 162.

The right of a beneficiary of a contract to sue was not involved in the decision, since the action was assumed by the court to be based on tort. As such, the question was whether the defendant was under an obligation to anyone except the sender of the message. The English courts would have answered in the negative. *Dickson* v. *Reuter's Telegram Co.* (1877) 3 C. P. Div. 1. The weight of authority in this country,

however, recognizes the existence of a duty upon telegraph companies towards third persons. *Ellwood* v. *W. U. Tel. Co.* (1871) 45 N. Y. 549; *Mentzer* v. *W. U. Tel. Co.* (1895) 92 Iowa, 752. This is on the theory that the company has undertaken a business which if negligently conducted may naturally and probably injure those to whom messages are directed, or in certain cases, perhaps, others for whose benefit messages are sent. Pollock Torts, 6th ed. (1901) pp. 532–4. On the question of allowing a recovery for mental suffering, see 1 COLUMBIA LAW REVIEW, 490.

TORTS—NEGLIGENCE—PRIVITY OF CONTRACT. The defendant, under a contract with the plaintiff's employer, placed cars on a siding, without setting the brake as had been the custom. The plaintiff was injured as a result. *Held*, he could recover. *O'Leary* v. *Erie Ry. Co.* (1901) 169 N. Y. 289.

The decision is put upon the ground that the defendant was bound to perform its contract with a third person with such reasonable care as "usually sufficed to protect plaintiff and his fellow workmen from danger," upon which it knew they habitually relied. The case is in accord with the doctrine of several comparatively recent decisions discussed in 2 COLUMBIA LAW REVIEW, 105.

WILLS—UNDUE INFLUENCE—CONFIDENTIAL RELATIONS. A rector was a beneficiary of the will of one of his parishioners and participated in its preparation by making suggestions. *Held*, these facts in themselves raised a presumption of law that the will was made under undue influence. *McQueen* v. *Wilson* (Ala. 1901) 31 So. 94.

Bancroft v. *Otis* (1890) 91 Ala. 279, cited in support of this singular decision, does not seem to uphold the principal case, but is rather a holding to the contrary. *Delafield* v. *Parish* (1862) 25 N. Y. 9, holds that the person propounding the will must prove the mental capacity of the testator, but that the presumption is in his favor. This can hardly be treated as an authority for the decision in the principal case. *Tyler* v. *Gardiner* (1866) 35 N. Y. 559, is an unequivocal holding to the contrary of the principal case, in support of which it is cited. The line of authorities is unbroken to the effect that suggestion alone never constitutes undue influence; the influence must be shown to be irresistible. And it is also the general rule that the burden of proof is upon him who alleges undue influence.